HUI HUAT

v.

DATUK KHOO ENG CHOO & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
[ORIGINATING SUMMONS NO: R2-24-73-98]
5 NOVEMBER 1999

CIVIL PROCEDURE: *Receiver - Dealings in assets - Alleged wrongdoings in sale of assets - Consent order - Consent order relieving receivers of liabilities - Effect - Whether plaintiff estopped from instituting action against receivers*

CIVIL PROCEDURE: *Derivative action - Co-operative society - Society under receivership - Action against receivers by member of society - Whether must go by way of derivative action - Society privy to consent order relieving receivers from liability - Whether society estopped from bringing action against receivers - Whether member of society equally disabled*

By an order dated 7 January 1987, the High Court granted the appointment of the 1st and 2nd defendants as receivers of the 3rd defendant co-operative society ('the society'). During their tenure as receivers, the 1st and 2nd defendants had disposed of assets of the society including the sale of assets to Kamunting Berhad ('Kamunting') valued at RM592 million. On 27 May 1996, pursuant to a consent order recorded by the High Court, the 1st and 2nd defendants were discharged with effect from 1 August 1996. And, *vide* para. 13 of the consent order, they were also relieved from liabilities under the receivership as of 1 June 1997.

The plaintiff, a member of the society, alleged that the 1st and 2nd defendants, in discharging their duties as receivers of the society, had committed wrongdoings contrary to the interest of the society and its members. In particular, it was alleged that the sale of the society's assets to Kamunting was unlawful. In consequence, on 9 October 1998, the plaintiff applied for leave to take proceedings against the 1st and 2nd defendants. The main issue that arose was whether on the terms of the consent order, the 1st and 2nd defendants could still be liable for acts done by them as receivers.

Held:

[1] The consent order given by the court has the effect of giving legal immunity to the 1st and 2nd defendants against parties involved in the said consent order, having regard to the fact that the receivers were appointed by the court.

[1a] The society was a party to the consent order. Therefore in accordance with the terms of the consent order the society is precluded from taking any proceedings against the 1st and 2nd defendants.

[2] The plaintiff, as a member of the society, could only sue the 1st and 2nd defendants by way of derivative action. However, since the society by virtue of the consent order was estopped from bringing any action against the 1st and 2nd defendants, the plaintiff was therefore equally incapacitated from bringing any action against the 1st and 2nd defendants. This must be so as a derivative action is not an independent cause of action but a cause of action accruing to the society which individual members can enforce for and on behalf of the society.

[3] The plaintiff's action cannot come within the exception to the derivative action principle. The alleged wrongdoers being the 1st and 2nd defendants, there is no doubt whatsoever that at the time this action was filed by the plaintiff, the two defendants were no longer having any control of the assets of the society. The two defendants had been discharged as receivers as of 1 August 1996, and that being so, the plaintiff had failed to establish his right to bring an action against the 1st and 2nd defendants. The plaintiff, further, had also failed to show a *prima facie* case in this application resulting in the application being frivolous and vexatious.

[Application dismissed.]

Case(s) referred to:

Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 2 CLJ 553 ***(refd)***

IRC v. Hoogstraten [1984] 3 WLR 933 ***(foll)***

For the plaintiff - Francis Lim (KG Lim with him); M/s Francis Lim & Co
For the 1st & 2nd defendants - K Mohan; M/s Shook Lin & Bok
For the 3rd defendant - Alice Teh; M/s HK Teh

Reported by WA Sharif

JUDGMENT

Azmel Maamor J:

The plaintiff in this case applied by way of an originating summons for leave to commence proceedings against the 1st and 2nd defendants; formerly the receivers of the 3rd defendant, a cooperative society. It was the allegation of the plaintiff that the 1st and 2nd defendants in discharging their duties as receivers of the 3rd defendant, had committed wrongdoings contrary to the interest of the 3rd defendant and its members. The application for leave was

contested by the two defendants. In the light of the fact that the argument between the parties would involve serious legal issues I decided to request counsels of both parties to submit written submissions. Consequent to my having carefully considered their written submissions together with the other document already filed in court I arrived at the conclusion that the application for leave should be dismissed.

Before stating my reasons in arriving at that decision I feel it is pertinent for me to give the brief facts. They are as follows. On the application of Bank Negara pursuant to the Essential (Protection of Depositors) Regulations 1986, the High Court granted the appointment of the 1st and 2nd defendants as receivers of the 3rd defendant on 7 January 1987. They were conferred with wide powers including among other matters to sell, lease or otherwise dispose of the assets of the 3rd defendant. During their tenure as receivers, the 1st and 2nd defendants, had disposed of assets of the 3rd defendant which included the sale of assets to Kamunting Corporation Bhd. at the value of RM592,000,000. On 27 May 1996 pursuant to a consent order recorded before the High Court the receivers were discharged as receivers with effect from 1 August 1996. Paragraph 2 of the said consent order reads:

> 2. Raja Arshad Bin Raja Tun Uda and Mr. Khoo Eng Choo be discharged as Receivers of the Respondent with effect from 1-8-1996.

This means that as of 1 August 1996 the two defendants were no longer in control of the assets of the 3rd defendant.

Pursuant to the same consent order as of 1 June 1997 the two defendants had also been relieved from the liabilities in respect of their actions under the receivership. This is stated in para. 13 of the said consent order which reads:

> 13. That on 1.6.1997 the Receivers be discharged from all liabilities arising under the receivership save and except for payment to the 2nd Intervenor all sums that may be found due from them under paragraph 12 above.

At the 3rd defendant's Annual General Meeting held on 17 October 1998 the plaintiff tabled the following resolution for approval:

> 1. That this General Assembly fully endorses and supports the court action proposed to be instituted by a delegate named Hui Huat on behalf of all the members of KSM against the said receivers for the benefit of KSM.
>
> 2. That the General Assembly directs the new Board to take immediate court action against the said receivers and other parties involved for:
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> (a) compensation/damages for losses suffered as a result of the unlawful disposal of all assets of KSM to Kamunting Corporation Berhad by the receivers.

(b) recovery of 500,000 shares in Korperasi Jayadiri Malaysia Berhad and the entire issued and paid up shares in KCB Credit and Leasing Sdn. Bhd. (formerly known as KSM Credit and Leasing Sdn. Bhd.).

However at the said Annual General Meeting the said resolutions were not passed by the members present.

On 3 November 1998 a member of the 3rd defendant had lodged a complaint with the Registrar General of Cooperative Societies raising matters as to the conduct of the said Annual General Meeting. The matter is still pending.

A number of legal issues were raised in the application for leave by the plaintiff to take proceedings against 1st and 2nd defendants.

The first and main issue concerns whether on the terms of the said consent order of the High Court, specifically the wordings of para. 13, the 1st and 2nd defendants could still be liable for acts done by them as receivers. At the outset it must be pointed out that the parties involved in the said consent order were Bank Negara Malaysia as the applicant, the 3rd defendant as the respondent, a member of the 3rd defendant, Tai Jip Keh @ Tai Min Pak as the 1st intervenor and the Registrar General of Cooperative Societies of Malaysia as the 2nd intervenor.

As I have mentioned above by virtue of para. 13 of the consent order it was ordered that as of 1 June 1997 the receivers (the 1st and 2nd defendants) were relieved from all liabilities arising under the receivership. The only exception is the matters arising under para. 12 of the consent order which are matters concerning repayment to the 2nd intervenor which was not under any dispute in this case. It is to be noted that the unlawful acts alleged to have been committed by the two defendants as contained in the plaintiffs proposed statement of claims for which this leave application was made are acts of the two defendants which fall under para. 13 and not falling under the exception under para. 12 of the said consent order. This consent order granted by the court has the effect of giving legal immunity to the 1st and 2nd defendants against parties involved in the said consent order, having regard to the fact that the receivers were appointed by the court. As such they were officers of the court. On this issue I only need to refer to the United Kingdom Court of Appeal decision in the case of *IRC v. Hoogstraten* [1984] 3 WLR 933 where Dillon LJ states:

> The sequestrators appointed under it were validly appointed and were during the continuance of the sequestration officers of the court. Has the court power to protect its officers from possible harassment by limiting a period within which proceedings to establish negligence on the part of the sequestrators or their firms must be launched if at all, and if so would it be appropriate to

> exercise that power? It has always been recognized that the court has power, by making an order for release and discharge, to protect its officer, whether a sequestrator or receiver, from all liability for acts done in the course of his duty.

As mentioned above the 3rd defendant was a party to the consent order. Therefore in accordance with the terms of the consent order the 3rd defendant is excluded from taking any proceedings against the 1st and 2nd defendants. It must also be noted that the order of the court was dated 27 May 1996 and the date the receivers were discharged from liabilities was 1 June 1997, a period of more than one year. This action by the plaintiff was only filed on 9 October 1998, a period of more than one year from the final date of liabilities of the 1st and 2nd defendants.

The plaintiff, as a member of the 3rd defendant, could only sue the 1st and 2nd defendants by way derivative action. But as mentioned above, the 3rd defendant by virtue of the consent order was estopped from bringing any action against the 1st and 2nd defendants. As a result the plaintiff is incapacitated from bringing any action against the 1st and 2nd defendants. This is so because a derivative action is not an independent cause of action but a cause of action accruing to the society which individual members can enforce for and on behalf of the society. This issue has been considered and decided in the Court of Appeal case of *Abdul Rahim bin Aki v. Krubong Industrial Park (Melaka) Sdn. Bhd. & Ors.* [1995] 3 MLJ 17 where Gopal Sri Ram JCA:

> I am glad to find this principle well stated by Prof. Gower in *Modern Company Law* (3rd Ed. 1909) at p. 587, in words which I would gratefully adopt:
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> > Where such an action is allowed, the member is not really suing on his own behalf nor on behalf of the members generally, but on behalf of the company itself. Although ... he will have to frame his action as a representative on behalf of himself and all the other members other than the wrongdoers, this gives a misleading impression of what really occurs. The Plaintiff shareholder is not acting as a representative of the other shareholders, but as a representative of the company ... In the United States ... this type of action has been given the distinctive name of a "derivative action" recognizing that its true nature is that the individual member sues on behalf of the company to enforce rights derived from it.

In the light of the above, since the 3rd defendant could no longer bring any suit against the 1st and 2nd defendants by reason of the consent order of which the 3rd defendant was a party, the plaintiff, whose right of bringing a cause of action is dependent on the 3rd defendant's ability to bring one, could no longer have the ability to bring any action against the 1st and 2nd defendants.

Related to the first issue is another subsidiary issue that is whether on the facts of this case the plaintiff's action can come within the exception to the derivative action principle. This exception can arise where the persons to be sued are themselves having the control of the assets and would not allow a suit to be brought against them in the name of the society. This principle is also well considered in the case of *Abdul Rahim bin Aki* (above) where Gopal Sri Ram JCA said:

> We now turn to consider the one exception with which this case is concerned. It is the derivative action; an ingenious procedural device created by courts of equity; by which the rule of judicial non-interference is overcome.
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> **It is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control in control of its decision making organs and will not for that reason, permit an action to be brought in its name.** In these circumstances, a minority shareholder may bring an action on behalf of himself and all the other shareholders, other than the defendants.
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> ... The state of claims or other pleadings filed in support of the originating process must disclose that it is a derivative action and recite the facts that make it so. Further, there must be an express statement in the pleading that the action is being brought for the benefit of the company named as a defendant. **An action that does not meet these requirements is liable to be struck out as being frivolous and vexatious**. (emphasis added).

As clearly stated in the above decision of the Court of Appeal in order to succeed in pursuing a derivative action all the requirements must be met. One of the said requirements and in fact the main requirement is that "the wrongdoers are in control of its decision – making organs." Applying this principle to the facts of this case, the wrongdoers being the 1st and 2nd defendants, there is no doubt whatsoever that at the time this action was filed by the plaintiff (9 October 1998) the two defendants were no longer having any control of the assets of the 3rd defendant. By virtue of para. 2 of the consent order of the High Court they were discharged as receivers with effect from 1 August 1996. That being the position the plaintiffs had failed to meet the most essential requirement in bringing a derivative action against the 1st and 2nd defendants. I therefore ruled that the plaintiff had failed to establish his right to bring an action against the 2 defendants. It was also alleged by the plaintiff that the 1st and 2nd defendants were being protected by Dato' Seri Ling Leong Sik and the MCA. In my view these were mere delegations without any substance, and I would not put much weight to them. In the circumstances such allegations would not have any bearing on this application.

It is trite law that in order for the court to grant leave the applicant must show that he has a *prima facie* case to succeed in his application. I found that the plaintiff had failed to show a *prima facie* case in this leave application. As a matter of fact I have arrived at the conclusion that the application by the plaintiff was frivolous and vexatious. I therefore dismissed the application with costs.